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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT A. MCINTOSH,

Defendant and Appellant.

D051743

(Super. Ct. No. SCN199464)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

A jury found Robert McIntosh guilty of first degree murder based on a premeditated murder theory (Pen. Code,¹ § 187, subd. (a)), and also found he committed the offense to benefit a criminal street gang and by personally discharging a firearm (§§ 186.22, subd. (b)(1), 12022.53, subd. (d)). The court sentenced McIntosh to prison

¹ Subsequent statutory references are to the Penal Code.

for 50 years to life, consisting of 25 years to life for murder with consecutive 25 years to life for the gun enhancement.

On appeal McIntosh contends the court erred in permitting a gang expert to respond to certain hypothetical questions pertaining to gang behavior during a shooting. We reject this contention and affirm the judgment.

RELEVANT FACTUAL SUMMARY

Prosecution Evidence

On November 12, 2002, at about 7:30 p.m., Pearl Seau and her fiancé, Avapouli Malotumau (Malo), were in their garage, seated at a table discussing bills. The garage door was open, and the light was on in the garage. As they were talking, Malo noticed a shadow out of the corner of his eye, and then saw a person approaching. As the man stepped out of the shadow, Malo saw the man was wearing a dark hooded sweatshirt. Seau's attention was still focused on the bills. Within seconds of seeing the figure, Malo heard the man say, "'Deep Valley Crips.'" The man then looked into the garage, pointed a gun in the direction of Malo and Seau, and fired four shots. Seau stood up from her chair to avoid being shot, but she was hit twice, once in her lower back and once in her upper back. Seau died shortly after paramedics and police arrived.

At trial, Malo identified McIntosh as the shooter. Malo said he had seen McIntosh at a nearby liquor store earlier that evening, and McIntosh had been staring at him and made some gang-related comments. Malo acknowledged he had previously identified another individual who looked like McIntosh, but Malo appeared certain at trial that McIntosh was the person who shot his fiancée.

McIntosh is a member of the Deep Valley Crips, an Oceanside gang. The Deep Valley Crips's rival gang is the Oceanside Deep Valley Bloods. The two gangs are "enemies." Malo and Seau were not Deep Valley Bloods gang members, but had friends and relatives who were members of this gang and these gang members would often spend time at their residence, primarily in the garage area.

Shortly after the shooting, police officers arrested another Deep Valley Crips gang member, but the officers released him after they were able to verify his alibi. Additional investigation led police officers to suspect that McIntosh was the shooter (including information that the gun used in the shooting had been in McIntosh's possession before the shooting), but officers were unable to locate McIntosh because he left town shortly after the shooting.

Three years later, in August 2005, police investigators learned McIntosh was in Texas, and they contacted him. McIntosh agreed to talk, and the investigators recorded the interviews. The video recordings of the interviews were played for the jury at trial.

During the initial interview, McIntosh said that the day of Seau's shooting he was "jumped" by several Deep Valley Bloods gang members. McIntosh denied shooting Seau, but admitted he was at the liquor store near Seau's apartment before the shooting. When officers told him that gunshot residue from the murder weapon was found on a sample taken from his hands shortly after the shooting and suggested his DNA had been found on the gun, McIntosh admitted he may have fired the gun earlier that day. The DNA representation was not true but was part of a law enforcement effort to test McIntosh's denials that he was not involved in the shooting. Investigators also used an

interview technique in which they suggested that McIntosh may have shot Seau accidentally.

Later that afternoon, the investigators conducted a second interview. After waiving his *Miranda* rights, McIntosh admitted shooting Seau, but said he did this accidentally, claiming he was only trying to scare the residents to send a message to Deep Valley Bloods gang members. McIntosh said he felt threatened by Deep Valley Bloods gang members after they threw him into traffic earlier that day, and he wanted to retaliate by engaging in a "fist fight" with rival gang members. However, his fellow gang members were taunting him and insisted that he retaliate with a gun. McIntosh and the other gang members then "cruised around" looking for a rival gang member. After failing to find a suitable target, they drove to the apartment complex where Malo and Seau lived because they were aware that Deep Valley Bloods gang members would spend time in the garage of the residence. Another gang member then scouted out the garage, came back and told McIntosh the door was open and "that's where they're all at." After a gang member handed McIntosh a loaded revolver, McIntosh approached the garage dressed all in black. McIntosh said that as he approached the garage, he did not see anyone inside, and then looked away as he fired multiple shots. He insisted he did not know anyone was in the garage, and that he had turned his head and twisted his back as he fired the gun. McIntosh said he left the area and went to Las Vegas shortly after the shooting.

At trial, Oceanside Police Detective Gordon Govier, who specializes in the documentation and investigation of Oceanside street gangs, testified for the prosecution

as a gang expert. Most of Detective Govier's testimony related to the issue whether McIntosh committed the crime to benefit and promote his street gang, which was relevant to proving the charged gang enhancement under section 186.22, subdivision (b)(1). As will be detailed below, Detective Govier also responded to hypothetical questions based on McIntosh's version of the incident as told to police during the second Texas interview, i.e., that he merely intended to scare the occupants of the residence, and turned his head when he fired the gun. In responding to these questions, Detective Govier opined that it was unlikely a gang member would have turned his head and shot randomly because (1) he would not have gained as much respect for the gang if he fired randomly; and (2) the gang member would have understood that it was dangerous to shoot without looking at the target because rival gang members are usually armed.

During cross-examination, defense counsel asked several hypothetical questions resulting in testimony from Detective Govier that was helpful to the defense. For example, Detective Govier agreed with defense counsel that sometimes a gang member would retaliate even if the gang member was not the individual who was the subject of the rival gang's actions. This testimony supported the defense theory (discussed below) that McIntosh was not the perpetrator of the crime. Additionally, in response to a defense hypothetical, Detective Govier agreed there are circumstances when firing into a rival gang's inhabited dwelling, without necessarily intending to kill an occupant, would get attention and "send a message" not to "mess with [that gang]." Detective Govier called the defense hypothetical based upon McIntosh's statements to the police, a "good analogy" of intimidating gang behavior.

Defense evidence

McIntosh testified on his own behalf at trial. In this testimony, McIntosh changed his story and denied that he was the person who shot Seau. He testified he had lied to police during the Texas interview to protect his friend, Joaquin Pruitt, who was the person who shot Seau. The prosecutor, however, elicited testimony from McIntosh suggesting he was not Pruitt's close friend and did not even know his first name, making it unlikely that McIntosh would have admitted to a fatal shooting to protect this person. Additionally, the evidence showed that Pruitt had died several years before trial, and that Pruitt had never been part of the Deep Valley Crips gang, and there was no evidence linking Pruitt to the crime. McIntosh claimed he did not know Pruitt was dead. McIntosh also said that he was high on Xanax and other drugs during the Texas interviews with police.

Arguments

Based on the evidence presented, the jury was instructed on first degree premeditated murder, and on second degree murder committed with malice aforethought. During closing arguments, the prosecutor urged the jury to find the murder was premeditated based on the evidence showing McIntosh went to Seau's garage with the intent to kill as retaliation for his being jumped by rival gang members earlier in the day. The prosecutor emphasized the evidence that McIntosh had been driving around earlier that day attempting to find a target in retaliation for the rival gang action and that he was carrying a loaded gun and could easily see inside the lit garage when he aimed at the occupants and pulled the trigger four times. But the prosecutor stated that if the jury

believed McIntosh's version as told to the police during the Texas interview—that he had the intent only to scare and looked away while he was shooting—the jury should find the killing was second degree murder because it was deliberately committed with a conscious disregard for human life. The prosecutor also maintained that McIntosh's newest version of the killing—that he had no involvement in the shooting and his deceased friend committed the crime—was not believable, focusing on numerous inconsistencies in McIntosh's testimony.

In response, defense counsel urged the jury to either accept defendant's trial testimony that he was not the shooter, or find credible his earlier version of the incident that he shot the gun into the garage only to scare the residents. With respect to the latter theory, defense counsel emphasized the physical evidence showing the bullets may have been fired at an angle that would not have hit persons who were sitting down.

After considering the evidence and argument, the jury found McIntosh guilty of first degree premeditated murder, and found true the gang enhancement (§ 186.22, subd. (b)(1)) and that McIntosh personally discharged the firearm (§ 12022.53, subd. (d)).

DISCUSSION

I. Claimed Evidentiary Error

McIntosh contends the court erred in permitting Detective Govier to answer certain hypothetical questions relating to McIntosh's version of the events told to police officers during his Texas interview. We conclude there was no error in admitting the testimony.

A. Summary of Gang Expert Testimony

At trial, Detective Govier testified about gang culture and psychology, including the importance of respect and the routine use of violence and intimidation to obtain that respect. Detective Govier also discussed the importance of retaliation in the gang culture, and opined that if a gang member is disrespected, his gang will engage in an immediate violent response to reestablish respect, including targeted assaults upon members and known associates of rival gangs. Detective Govier additionally testified that as a result of gangs receiving negative press from the number of innocent civilians killed in drive-by shootings, local gangs decided to target victims more closely through "walk-ups" rather than drive-by shootings. A "walk-up" occurs where the gang member closely approaches the target victim and assaults or shoots him.

The prosecutor also asked Detective Govier hypothetical questions based on the prosecution evidence and theory of the case, i.e., that after being jumped by Deep Valley Bloods earlier in the day, a gang member sought out retaliation and intimidation on behalf of Deep Valley Crips, walked up to Seau's garage, said "'Deep Valley Crips,'" and shot at the occupants "gangster style." Detective Govier opined that such a targeted shooting would act to the gang's benefit because it advertises to the community and rival gangs that Deep Valley Crips would not be intimidated or "messed with," and it raises respect for the shooter and the gang. He also stated that in terms of respect and retaliation it did not matter that the victims were not the persons who were involved in the earlier incident.

The prosecutor then asked Detective Govier hypothetical questions based on McIntosh's admissions to police, i.e., that he turned his head away and fired randomly into the garage. The prosecutor asked whether under that scenario the action would "be for the benefit of the gang, at the direction of the gang, and in association with the gang." Detective Govier responded in the affirmative, explaining that "[w]ord on the street is going to travel that [Deep Valley Crips] did a walk-up on [Deep Valley Bloods]. Whether . . . when the shots were fired if the person was actually looking at the target, the same effect occurs is that the Deep Valley Crips are going to benefit from that shooting by gaining notoriety amongst the rival gang members and within the community as being a vicious criminal street gang."

The prosecutor then asked two final questions that are challenged on this appeal. First, the prosecutor asked which version of the evidence was more consistent with gang culture and gang lifestyle: (1) the version where the shooter "look[s] in where the target is, yell[s] 'Deep Valley Crips' and fire[s] at the first body . . . that they can hit and then leave[s]; or (2) the version where "a person would walk up to a garage where a rival gang member is . . . not even look at who they're shooting at, walk up, turn their head, fire shots, and run" Detective Govier answered that the first scenario was more consistent, explaining that "The gang member committing the crime obviously is not going to have as much respect if they just fire randomly without knowing that they are going to injure a target."

Second, the prosecutor asked: "Would you also consider the fact that the rival gang could potentially be armed as well, and if you walk up and blindly look that you

may take return fire?" Detective Govier responded: "Yes, it would make no sense if you approach and you know you're approaching a location where rival gang members are. Gang members know, amongst themselves, that they're commonly armed to defend themselves against rival gang—gang members, and it would not make sense whatsoever to not have your eyes on what you're doing and who you may potentially confront in order to defend yourself. If you walked up and didn't look, you may be taking a bullet before you even get a chance to fire your own gun."

On appeal, McIntosh challenges the prosecutor's last two questions, arguing they sought irrelevant information and improperly elicited expert opinion on the issue of McIntosh's intent to kill.

B. *Legal Analysis*

The California Supreme Court has held that an expert may testify about criminal street gangs when the testimony is relevant to the case. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) Expert opinion testimony is admissible "'if the subject matter of the testimony is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.''" (*Ibid.*) The subjects of gang culture, gang habits, gang psychology, and gang sociology meet this criterion. (*Ibid.*)

At trial, Detective Govier testified that a gang member's motivation for a "walk-up" shooting is to gain respect for the gang. In the challenged testimony, Detective Govier opined that a gang member would not earn as much respect for firing randomly as he would by aiming a gun directly at the victim, and that it would be dangerous to a shooter to start firing without looking at the rival gang members. This evidence was

relevant on the issue of McIntosh's intent and motivation and was beyond the common experience of the jurors. Although it may appear to be obvious that a gang member would not look away while he is committing a retaliatory shooting, the trial court could reasonably find that the jury would benefit from Detective Govier's opinion on this issue because the manner and mode of violent gang retaliation is outside the common experience of a juror. An expert opinion may be admitted if it would assist the jury, even if the jury has some knowledge of the matter. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300.)

McIntosh contends the prosecutor's questions called for information that was "simply irrelevant" because the prosecutor sought an opinion only as to whether McIntosh was "guilty" and not "credible." We disagree. The prosecutor did not ask Detective Govier to directly opine on McIntosh's guilt or credibility. The questions sought information to help the jury better understand the sequence of events and the version of the events that most closely reflects typical gang behavior. This form of opinion testimony is admissible. (See *People v. Gonzalez, supra*, 38 Cal.4th at p. 945 [rejecting argument that expert could not testify to "'how all relevant gang members would behave in a particular set of circumstances'"].)

McIntosh alternatively contends the evidence was inadmissible because it was relevant only to show his mental state.

If expert opinion evidence is relevant and addresses a matter beyond common experience, it is admissible even if it encompasses an ultimate issue in the case. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; Evid. Code, § 805.) Thus, a gang expert

may testify regarding gang-related motivations and may provide gang-related information from which the jury may infer the defendant's state of mind. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1513; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550-1551; see also *People v. Ward* (2005) 36 Cal.4th 186, 209-211.)

However, a gang expert may not give a direct opinion about the particular defendant's subjective knowledge or intent. (*People v. Gonzalez, supra*, 126 Cal.App.4th at pp. 1550-1551; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651-659.) This form of testimony is improper because it is tantamount to expressing an opinion as to the defendant's guilt. (See *Killebrew, supra*, 103 Cal.App.4th at p. 651.) An expert opinion on an ultimate issue is not admissible if it "amounts to no more than an expression of [the expert's] general belief as how the case should be decided . . ." (*Ibid.*) This type of opinion improperly "suggest[s] that the judge and jury may shift responsibility for decision to the witnesses," and "is wholly without value to the trier of fact in reaching a decision." (*Ibid.*)

In this case, Detective Govier did not give his subjective opinion on McIntosh's state of mind at the time of the killing. Instead, he provided information from which the jury could better evaluate McIntosh's claim that he physically turned away while he fired shots into Seau's garage. Based on a hypothetical, the prosecutor asked the expert to assume that the garage was occupied, that gang members regularly spent time in the garage, and that a gang member fired shots into the garage to retaliate for an earlier assault against him. On these assumed facts, Detective Govier stated that because the motivation for this type of shooting is to intimidate the other gang members and to gain

respect from the community, it is more likely that the shooter would face his victims rather than turning away while he was firing the shots.

In arguing the questions called for inadmissible state-of-mind testimony, McIntosh relies on *People v. Killebrew*, *supra*, 103 Cal.App.4th 644. *Killebrew* is factually distinguishable. In *Killebrew*, the defendant was convicted of conspiracy to possess a handgun after police found a handgun in one of three vehicles occupied by gang members and another handgun at a place where the members had stopped. (*Id.* at pp. 647-649.) The evidence was conflicting as to whether Killebrew (who was a gang member) had been in one of the vehicles. (*Id.* at p. 649.) The gang expert opined that "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Id.* at p. 652.) The court found this testimony was inadmissible because the expert directly "testified to the subjective *knowledge and intent* of each occupant in each vehicle." (*Id.* at p. 658.) The court noted that this "testimony is much different from the *expectations* of gang members in general when confronted with a specific action. [¶] [The expert's] testimony was the only evidence offered by the People to establish the elements of the crime. As such, it is the type of opinion that did nothing more than inform the jury how [the expert] believed the case should be decided. It was an improper opinion on the ultimate issue and should have been excluded." (*Ibid.*)

In this case, Detective Govier did not similarly tell the jury how it should decide the issue of McIntosh's intent. Detective Govier was not asked, and did not testify, that McIntosh premeditated the crime. In response to a hypothetical question, Detective

Govier testified that it would be unlikely that a gang member committing a retaliatory act would turn his head while firing into an occupied garage. This testimony constituted an expert opinion about the typical behavior of gang members when confronted with a particular set of circumstances, a type of opinion recognized as proper by the *Killebrew* court. (*People v. Killebrew, supra*, 103 Cal.App.4th at p. 658.) The jury was free to evaluate this testimony, together with McIntosh's videotaped statements and the circumstantial evidence, including evidence showing that McIntosh and the other gang members were looking for rival gang members to retaliate against, to determine whether McIntosh's statements that he turned away and did not intend to kill were credible. The fact that the expert testimony was highly probative on the ultimate issue of whether the crime was premeditated did not render the testimony inadmissible. (See *People v. Gonzalez, supra*, 38 Cal.4th at p. 947; *People v. Gonzalez, supra*, 126 Cal.App.4th at p. 1550.)

II. *Ineffective Assistance of Counsel Claim*

McIntosh also contends his counsel violated his right to effective assistance of counsel because he failed to object to the portions of Detective Govier's testimony challenged on appeal. Because we find the testimony was properly admitted, we need not reach this issue. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 934-935 ["[t]he failure to object to admissible evidence does not constitute ineffective assistance of counsel when to do so would have been futile"].)

We note further that there were obvious tactical reasons for defense counsel to decide not to object to the prosecutor's hypothetical questions pertaining to McIntosh's

pretrial version of the events. In his cross-examination, defense counsel used similar hypothetical questions to elicit testimony from Detective Govier that was helpful to the defense. For example, Detective Govier characterized the defense hypothetical based on McIntosh's pretrial statements that he was intending only to scare the victims, a "good analogy" of intimidating gang behavior. Ineffective assistance claims are not cognizable on appeal if there is any conceivable tactical basis for failing to object to certain evidence. (See *People v. Stanley* (2006) 39 Cal.4th 913, 954.)

Additionally, there is no reasonable probability the challenged testimony was prejudicial. (See *People v. Williams* (1997) 16 Cal.4th 153, 215 [to prevail on a ineffective assistance claim defendant must establish prejudice flowing from counsel's conduct].) The evidence that McIntosh intended to shoot the individuals in the garage was overwhelming. Even without the expert testimony, it is not reasonably probable a jury would have found that a gang member who had been attacked by rival gang members earlier in the day would have walked up to a lighted garage occupied by two people known to spend time with the rival gang members, aimed a loaded weapon, and then fired four shots at these individuals, without the intent to kill them. At trial, even McIntosh refused to reassert his prior claim of an "accidental killing," and instead tried to suggest (contrary to the overwhelming evidence) that he was not the shooter. Further, the expert testimony challenged on appeal was brief and was not a primary focus of the prosecution's case. The prosecutor never mentioned this testimony during closing arguments, and instead focused the jury on the numerous items of circumstantial evidence showing that McIntosh intended to kill.

DISPOSITION

Judgment affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.